Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

BOBBIE OSBURN,

Petitioner,

v.

ATLANTA CENTER FOR DERMATOLOGIC DISEASES AND DR. GILBERT GOLDMAN,

Respondents.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Official Code of Georgia Annotated § 9-3-71(b), dealing with medical malpractice statutes of repose, is unconstitutional as a denial of equal protection and due process guaranteed to petitioner Bobby Osburn pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and Art. I, Sec. I, ¶¶ 1 & 2 of the Constitution of the State of Georgia.

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OPINIONS BELOW

The order of the Georgia Supreme Court, dated December 9, 2004, denying the Motion for Reconsideration, Case No. S05C0104, was not published but is attached hereto in the Appendix. The Supreme Court of Georgia's denial of the writ of certiorari is dated November 22, 2004. The Georgia Court of Appeals' decision for which the writ of certiorari was denied is reported at 269 Ga. App. 303.

The order of the Court of Appeals, dated August 27, 2004, denying the Motion for Reconsideration, Case No. A04A1505, is attached hereto in the Appendix. The opinion of the Court of Appeals, affirming the trial court's grant of summary judgment to respondents, is reported at 269 Ga. App. 303.

The order of the trial court granting respondents' motion for summary judgment from which the appellate course of this case has run is dated September 5, 2003 by Judge Patsy Y. Porter, of the Fulton County State Court. That order is set forth in the appendix.

JURISDICTION

This petition for a writ of certiorari is filed within 90 days of the date of the Supreme Court of Georgia's denial of the motion for reconsideration herein. Jurisdiction is invoked and conferred by 28 U.S.C. § 1257.

Petitioners seek review of the Georgia Court of Appeals decision, which as demonstrated below, denies equal protection of the law inasmuch as the classification of medical malpractice claims which are subject to the five

year statute of repose does not bear a substantial relationship or a rational relationship to the purpose of the statute and denies due process of law. Petitioner properly preserved her constitutional claims by raising them in the trial court (see Appendix App. 13-15) and in the Court of Appeals (see Appendix App. 18-21; 22-25).

The judgment is ripe for review, as a categorical exception to the finality rule, though adjudication of an independent contract claim remains to be held in the state courts. As long recognized by this Court, a judgment may be sufficiently final for review, despite further proceedings pending in the state courts, where, as here, the federal issue has been conclusively resolved with no need for further state court proceedings. *Cox Broadcasting Corporation et al., v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 2d 328, 32 Rad. Reg. 2d (P & F) 1511, 1 Media L. Rep. 1819 (1975). Furthermore, the possibility that petitioner may prevail at trial on the nonfederal issue does not preclude immediate review. If Petitioner prevails on the nonfederal issue, the need to litigate further would be eliminated, and this Court would be deprived of important constitutional and statutory review.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. U.S. Const. Amendment V:

> No person shall be deprived of life, liberty, or property, without due process of law; . . .

2. U.S. Const. Amendment XIV, § 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Ga. Const. Art. 1, § 1, ¶ 1:

> No person shall be deprived of life, liberty, or property except by due process of law.

4. Ga. Const. Art. 1, § 1, ¶ 2:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

5. Official Code of Georgia Annotated § 9-3-71(a):

> Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.

6. Official Code of Georgia Annotated § 9-3-71(b):

> Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.

STATEMENT OF CASE

This case arises out of a medical malpractice suit filed by Petitioner Bobbie Osburn against Respondents Dr.

Gilbert Goldman and Atlanta Center for Dermatologic Diseases, M.D., J.D., P.C.

The state of Georgia has enacted a medical malpractice statute of repose which denies equal protection and due process of the law to those victims of malpractice whose injuries do not manifest before five years after the act of malpractice.

O.C.G.A. 9-3-71(b) bars medical malpractice claims brought more than five years after the act or omission constituting malpractice occurred. The inherent "right to unfettered access to the courts so that every party to a lawsuit is afforded the opportunity to be heard and to present his claim or defense" Const. Art. 1 § 1 ¶ 1 is a right denied to those persons who do not discover their injuries until more than five years after the negligent act, while the same right is not denied to those persons who do discover their injuries less than five years after the negligent act.

Innuendo and half truths upon which this arbitrary classification is apparently based bear no relationship to the state of affairs of Georgia. Based on the evidence in the record that many injuries, epitomized by those suffered by Petitioner, may take more than five years after an act of malpractice to manifest, and based on evidence indicating that a five year period of ultimate repose is far too attenuated from any stated objective, the medical malpractice statute of repose is unconstitutional as a violation of equal protection. Notably, the Supreme Court of Washington addressed a similar constitutional challenge to an eight year medical malpractice statute of repose, holding that "the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or

irrational . . . the relationship between the goal of alleviating any medical insurance crisis and the class of persons affected by the eight year statute of repose is too attenuated to survive rational basis scrutiny." *DeYoung v. Providence Medical Center, and J.T. Griffin, M.D., his wife, and the marital community thereof, and Unknown John Does*, 136 Wash.2d 136,149, 960 P.2d 919 (1998).

The classification of medical malpractice claims which are subject to the five year statute of repose further denies victims like Petitioner Osburn due process of law by extinguishing vested rights, not by procrastination on the part of the plaintiff, but by an unreasonable and arbitrary time bar. *See Picket v. Brown*, 462 U.S. 1, 13-14 (1983). (This Court held that although legislatures have a legitimate interest in protecting defendants from stale claims, this does not justify the imposition of unrealistically short time bars.)

In the present case, the five year period specified by O.C.G.A. 9-3-71(b) applied to bar Petitioner Bobby Osburn's malpractice claim against Respondent Dr. Gilbert because she was not able to know of Respondent's negligence until almost five years after the act of malpractice.

Petitioner Osburn first visited Respondent Goldman on March 1, 1991 to discuss eradication of the small spider veins on her legs. Following her initial consultation, Respondent Goldman suggested using liquid silicone to inject in the lines and wrinkles on Petitioner's face. Petitioner informed Respondent that she suffered from several allergies and voiced concerns over an adverse reaction with the silicone, or even the possibility that the silicone might travel under her skin. Respondent Goldman assured her that silicone injections had never caused allergic

reactions on anyone, and certainly no harm would be caused to Petitioner, either from an allergic reaction or from the silicone traveling under her skin.

Persuaded by the statements of her physician, Petitioner Bobby Osburn was injected with liquid silicone in her face, with these injections taking place from March 12, 1991 to December 18, 1995. However, Petitioner's injury did not occur until late March of 2000, when Petitioner for the first time woke up with bumps and swelling on her face.

On April 3, 2000, Petitioner sought treatment from Dr. Gross due to the eruptions on her face. Dr. Gross informed Petitioner that the previous silicone injections given by Respondent caused the reactions. Each area of injection had to be surgically removed. Petitioner continued to experience new episodes from the injections and finally returned to Respondent Goldman for help. He admitted his negligence and stated that he would cover the costs to fix the problems if she would keep confidential his conduct. This breach of contract claim is currently pending in the lower court.

Although Respondent Goldman promoted the silicone injection as a safe procedure, even suggesting their use to Petitioner, Doctors have been warned against their use since 1976, at which time they were restricted to use only in cases of severe facial deformity. In 1991 the FDA noted "it [the FDA] has not approved liquid silicone injections for any purposes." They further stated the "FDA prohibits manufacturers or doctors from marketing or promoting unapproved products such as liquid silicone. This means that a doctor cannot legally advertise or sell this material." None of this was news to Respondent Goldman who

admitted in his deposition that "it was general knowledge that the FDA had not approved silicone, liquid silicone for-injection for cosmetic reasons." (R.480-481). Respondent Goldman ignored the FDA warnings and continued to inject Petitioner Osburn.

On March 15, 2002, Petitioner Osburn filed her medical malpractice action against Respondents, less than two years after she first discovered any facial disfigurement.

Respondents moved for summary judgment based on the medical malpractice statutes of limitation and repose and Petitioner charged Respondents with fraud estopping the statute of repose defense and challenged the statute of repose on equal protection and due process grounds. Finding no evidence of fraud by Respondent Goldman, the trial court determined that the action was barred by the statute of repose and awarded summary judgment.

Petitioner Osburn filed her notice of appeal to the Georgia Court of Appeals, which affirmed the trial court's decision finding a lack of evidence to support allegations of fraud sufficient to estop the statute of repose defense. The Court of Appeals erroneously determined that Petitioner Osburn's challenge to the constitutionality of the medical malpractice statute of repose was asserted for the first time on appeal, when in fact, Petitioner properly raised the argument in her brief in opposition to Respondents' Partial Motion for Summary Judgment in the trial court. Based on this error, the constitutional issue was not considered on its merits. Instead the Court merely indicated that the Georgia Supreme Court has upheld the constitutionality of the statute.

A motion for reconsideration of that decision was denied. On September 16, 2004, Petitioner filed her petition for Writ of Certiorari in the Supreme Court of Georgia. The Supreme Court of Georgia denied her request. A motion for reconsideration of that decision was also denied.

REASON FOR GRANTING THE PETITION

I. O.C.G.A. § 9-3-71(b) is unconstitutional as a denial of equal protection and due process insofar as the classification of medical malpractice claims which are subject to the five year statute of repose bears no relationship to the achievement of a state objective.

The core of the equal protection challenge and the due process challenge to O.C.G.A. § 9-3-71(b) involves its operation as an abbreviated statute of limitations period to unconstitutionally lock the courtroom door to some but not all the people of this State. Included in the class barred by the five year statue of repose are those who did not sleep on their rights but whose very injury is defined by its dormancy.

By definition the effects of liquid silicone injections may take years to appear, "the inflammatory reactions may develop many years after injection and no predictable factors can be recognized in patients who develop them. "Adverse Granulomatous Reaction After Cosmetic Dermal Silicone Injection," *American Society for Dermatologic Surgery*, 2001; 27:196-200. Consequently, Petitioner is denied a reasonable opportunity to assert her malpractice claim because of the palpable inability to discover the

symptoms attributable to Respondents' negligence prior to March of 2000.

The Georgia Court of Appeals acknowledged that the complaint was timely filed for the purposes of the statute of limitations period, "Osburn brought this suit within two years after her injuries manifested themselves, but more than five years after her last treatment by Goldman. Therefore this action is barred by the statute of repose . . . " Reasoning that "A statute of limitation differs from a statute of ultimate repose in that a statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable."

Georgia courts have long recognized that it is inequitable and unjust for a statute to run if the plaintiff is unaware that a cause of action exists. See e.g. *Allrid v. Emory Univ.*, 249 Ga. 35, 37 285 S.E.2d 521 (1982) (noting that the medical malpractice statute as then written was "an extremely harsh limitation in application because it has the effect, in many cases, of cutting off rights before there is any knowledge of injury."); *Luem v. Johnson,* 258 Ga. App. 530, 574 S.E.2d 835 (2002) (noting the unfair result where plaintiff could not reasonably have been expected to have known "her legal rights had been invaded until she discovered the causal relationship between the doctor's negligence and her injury.")

Nevertheless, the quest to preserve a person's rights until there is knowledge of injury has turned into an immediate denial of rights under the statute of repose even without such knowledge. The time period set forth in

O.C.G.A. 9-3-71(b) bears no relation to any state interest, either under a minimum scrutiny analysis or intermediate scrutiny analysis. Not only is this application of the statute unjust, it is unconstitutional.

a. O.C.G.A. § 9-3-71(b) denies equal protection of the law to equally situated medical malpractice claimants without either a substantial basis or a reasonable basis to do so.

"No person shall be denied equal protection of the laws." Ga. Const. Art. 1, § I, 2; U.S. Const. Amendment XIV. The equal protection clause prohibits the state from treating similarly situated individuals differently by creating disparate categories among them without a substantial basis or a rational basis for doing so. *Kelley v. Ga. Dept. of Human Resources*, 269 Ga. 384, 386, 498 S.E.2d 741, 744 (1998). See also *Celotex Corp. v. St. Joseph Hospital*, 259 Ga. 108, 376 S.E.2d 880 (1989) (statute that creates longer statute of limitations for claims against asbestos manufacturers than against other defendants denies equal protection).

O.C.G.A. § 9-3-71(b) creates an arbitrary classification of plaintiffs in medical malpractice cases. The first classification includes those victims of medical malpractice who discover bodily harm within five years of the date of the negligent act or omission. The second classification includes those persons who discover their injuries more than five years after the date of the negligent act or omission. The statute allows the first group to bring an action against the negligent doctor. The second group has no cause of action because the statute says it is abrogated and is in a state of ultimate repose.

Georgia courts have long recognized that a statute of limitations that treats different classes of people differently can violate the equal protection clause. In *Shessel v. Stroup*, 253 Ga. 56, 316 S.E.2d 155 (1984), the Georgia Supreme Court held that the Georgia malpractice statute of limitations, as then written, which could bar a claim before it accrued, denied equal protection under the laws and was unconstitutional. The Georgia Supreme Court held that the medical malpractice statute at that time was unconstitutional as applied to a case where the injury did not arise until more than two years after the negligent act occurred. The Georgia Supreme Court concluded that there was no rational basis for treating medical malpractice claimants differently, depending on whether their injury arose more than two years or less than two years after the negligent act. The Georgia Supreme Court found "no substantial relation in this . . . classification to the object of a limitation statute. All who are similarly situated are not treated alike."

In 1985, one year after *Shessel*, O.C.G.A. § 9-3-71 was amended so that the statute did not begin until the injury arising from the negligent act occurred; and in no event permitting an action of malpractice to be brought more than five years after the date on which the negligent or wrongful act or omission occurred. Still, it presents the same equal protection problem identified in *Shessel*: that is it treats medical malpractice patients differently depending upon when discovery of the injury occurs.

b. There is no substantial relationship or reasonable relationship between the classifications created by O.C.G.A. § 9-3-71(b) and the goals of elimination of stale claims, helping insurers to assess premiums based on known risks made difficult to assess with the passage of time, and reducing the period of potential liability to keep health care affordable.

While this Court has recognized that the Fourteenth Amendment does not deny the States the power to treat different classes of people in different ways, the Equal Protection Clause DOES "deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute," *Reed v. Reed*, 404 U.S. 71, 75-76, 92 S.Ct. 251, 253-254, 30 L.Ed.2d 225 (1971).

In determining whether a statutory classification is constitutional, the court may apply an intermediate standard of review requiring that the classification be substantially related to an important governmental objective. *Ponder v. Fulton-DeKalb Hospital Authority*, 256 Ga. 833, 835, 353 S.E.2d 515 (1987). As discussed at length by the dissenting opinion in *Craven v. Lowndes County Hospital Authority*, 263 Ga. 657, 437 S.E.2d 308, the right infringed upon in the present case is the right of access to the court. Such rights are termed substantive rights. *Polito v. Holland*, 258 Ga. 54, 365 S.E.2d 273 (1988). An intermediate level of scrutiny or the substantial relation test must be applied to an infringement of substantial rights. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

Petitioner acknowledges that an equal protection challenge has been made to this statute in *Craven v. Lowndes County*, 263 Ga. 657, 658-659 (1) in a 4-3 Georgia Supreme Court decision.

Petitioner submitted below, in a good faith effort to readdress the Georgia Supreme Court's position on this issue, that because of the growing complexity of modern medicine, the varying times in which different medical procedures can lead to damage beyond five years after negligence, and because O.C.G.A. § 9-3-71(b) is unequal to the statute of repose set forth in O.C.G.A. § 9-3-51 that this is an appropriate time, 11 years following *Craven* to reconsider the Georgia Supreme Court's divided 4-3 opinion in Craven. See also *Beck v. Dennis*, 215 Ga.App. 728(2) (1994) (suggesting that a five year statute of repose is unrealistically short.)

The "right to unfettered access to the courts so that every party to a lawsuit is afforded the opportunity to be heard and to present his claim or defense." Const. Art. 1 § 1 ¶ 1 is denied to one class of medical malpractice plaintiffs without regard to whether those plaintiffs could have even known of their injuries. If the lower court has the power to nullify sacred rights guaranteed by the Constitution to persons currently unaware of their potential claim, Petitioner urges this Court to apply more rigorous judicial scrutiny. The "rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test . . . The classifications must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) in order to

satisfy equal protection guarantees under the Constitution of the State of Georgia.

The relevant inquiry, then, is whether the classification here furthers the objective of the statute that created the classification, the statute of limitations; thereafter amended in 1985 to include the five year statute of repose. In *Clark v. Singer*, 250 Ga. 470, 298 S.E.2d 484 (1983), the identified interest behind O.C.G.A. § 9-3-71 was elimination of stale claims. The amended version of O.C.G.A. § 9-3-71 is directed toward additional interests that address the passage of time. " . . . Because of the nature of the practice of medicine, uncertainty over the causes of illness and injury makes it difficult for insurers to . . . assess premiums based on known risks. Furthermore the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause." majority at p. 310.

The question now is whether the legislature's classification of medical malpractice plaintiffs is reasonable, not arbitrary and bears a fair and substantial relation to those objectives. In other words, the record must support a conclusion that five years is the point at which elimination of many meritorious claims will significantly improve the problem of long term liability. And as recognized by this Court, the relationship of a classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

A comprehensive study performed by Harvard noted that of all medical malpractice patients harmed by

negligence, only 1.53% ever filed a claim. This means less than 1.53% of claims are those of adults reported over five years after the incident of malpractice and 98.47% of all patients harmed by medical malpractice never even bring suit. "Relation between malpractice claims and adverse events due to negligence. Results of the Harvard Medical Practice Study III," *New England Journal of Medicine*, Vol. 325:245-251.

"A repose provision affecting so few claims and involving such a small amount of what insurers pay could not possibly have any meaningful impact on the medical malpractice industry and is far too attenuated . . . " to survive under intermediate scrutiny or minimum scrutiny. *DeYoung v. Providence Medical Center*, 136 Wash.2d 136, 149, 960 P.2d 91.

c. O.C.G.A. § 9-3-71(b) denies due process of law to equally situated medical malpractice claimants without a substantial basis or reasonable basis to do so.

"No person shall be deprived of life, liberty or property except by due process of law." Ga. Const. Art. I, § 1, ¶ 1 see also U.S. Const. Amendment XIV. "A litigant does have a property interest in her cause of action that she may not be deprived of without due process." *See Ga. Dept. of Medical Assistance v. Columbia Convalescent Center*, 265 Ga. 638, 639, 458 S.E.2d 635, 637 (1995). The due process clause does not permit an application of the statute of limitations that would deprive plaintiff of the two year statutory period for identifying and pursuing a claim against her doctor which should be treated differently for different classes of malpractice plaintiffs. The medical malpractice statute of limitations does not comport with

the due process clause and is unconstitutional as applied to Petitioner.

There can be no question here that Petitioner was unaware that exposure to silicone caused her facial deformity until the deformity actually surfaced upon her face. Petitioner was completely unaware that exposure to silicone could cause any adverse reaction because she was uninformed of the FDA warnings against the use of silicone injections and the American Society for Aesthetic Plastic Surgery's outright opposition to liquid silicone and the well documented reports of migration of silicone over months to years. Instead, she relied upon Respondent Goldman as her doctor and "Patients are entitled to rely on their doctors' diagnoses in deciding on a course of treatment." *Breyne v. Potter*, 258 Ga.App. 728, 730, 574 S.E.2d 916, 920 (2002); *citing Stephen Brown Radiology v. Gowers*, 157 Ga.App. 770, 278 S.E.2d 653 (1981).

The statute of repose deprives petitioner of due process because it operates to bar an existing cause of action; exposure to silicone, a legally cognizable cause of action which the Petitioner has a vested right to pursue. The due process clause protects vested interests against unreasonable interference. *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). Respondent's actual act of malpractice, delineated by the lower courts as the date the last injection was administered, occurred in 1995, although discovery of the injury from exposure occurred in 2000. The event giving rise to Petitioner's cause of action is the injury from being exposed to silicone which occurred concurrent with the lower court's determination of malpractice. While the physical disfigurement did not manifest until almost five years later, injection of a toxic substance banned by the FDA, into Petitioner's face, a

patient with several known allergies who was never even tested for an allergy to silicone, caused injury upon contact.

Petitioner's rights vested *before* the statutory time bar denying her of a remedy without due process of law. This Court has without exception prohibited abrogating a vested right without providing alternative relief to the plaintiff. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 87, 88 n. 32 (1978); *Silver v. Silver*, 280 U.S. 117, 123 (1929); *Truax v. Corrigan*, 257 U.S. 312, 329 (1921).

This is not a case where the Georgia legislature has barred a future cause of action. After seven rounds of liquid silicone injections to her face, Petitioner was already injured. It was only her discovery of an already existing right which occurred outside the statute of repose.

The constitutional necessity of access to the court includes a reasonable time to bring one's case to court. *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 246 (1944). The statute of limitations must reasonably and adequately allow a plaintiff to enforce his rights. This requirement is satisfied only when a person has free access to courts for a length of time sufficient for an ordinarily diligent person to commence legal proceedings to protect his rights. *Penn Mut. Life Ins. Co. v. Lederer*, 252 U.S. 533 (1920). The statute of repose denies Petitioner a reasonable and adequate opportunity to enforce her rights.

The harm was only discovered immediately prior to the running of the statute of repose. In the present case, then, the statute of repose prevents the prosecution of a fresh, rather than a stale cause of action. In recognition that the legislatures may not deprive plaintiffs of a reasonable opportunity to assert their claims, this Court has

held that the interest in protecting defendants from stale claims does not justify unrealistically short time bars. *Picket v. Brown*, 462 U.S. 1, 13-14 (1983). Further, the state's interest in assessing premiums made more difficult with the passage of time is irrelevant when the injury of which the tortfeasor is aware occurs just prior to the running of the statute of repose.

Finally, the statute of repose set forth in O.C.G.A. 9-3-71(b) imposes an arbitrary time limit on medical malpractice victims, which is shorter than the 10 years afforded those whose injuries arise from deficiencies in planning, supervising or construction improvement. See O.C.G.A. 9-3-51. Instead it should be the same or longer, given the rapidly changing state of medicine.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review and reverse the judgments below. In the alternative, and recognizing that this Court cannot take every meritorious case that is presented it, due to the sheer volume of petitions for writ of certiorari presented to it, Petitioner requests that this Court, in the alternative, reverse and remand this case to the Georgia Supreme Court for further proceedings.

Respectfully submitted,

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SECOND DIVISION
SMITH, C. J.,
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NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rules 4 and 37, September 5, 2002) http://www.gaappeals.us/rules/

August 13, 2004

In the Court of Appeals of Georgia

A04A1505. OSBURN v. GOLDMAN et al.

PHIPPS, Judge.

From March 1991 through January 1996, Dr. Gilbert Goldman gave Bobbie Osburn injections of liquid silicone to eradicate lines and wrinkles in her face. On March 30, 2000, Osburn began to sustain facial eruptions and swelling caused by the injections. To recover damages, Osburn brought this medical malpractice action against Goldman and his employer, Atlanta Center for Dermatologic Diseases, P.C., on March 15, 2002.

Defendants answered the complaint and argued, among other things, that this action is barred by the medical malpractice statutes of limitation and repose. Osburn, however, charged Goldman with fraud estopping the defendants from asserting the statute of repose defense. Finding no evidence of fraud by Goldman, the trial court determined that this action is barred by the statute of repose and awarded summary judgment to the defendants. Osburn appeals. We affirm.

1.(a) A statute of limitation differs from a statute of ultimate repose, in that

> [a] statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable. [Cit.] [1]

The Georgia statute of limitation for medical malpractice is codified at OCGA § 9-3-71 (a); it permits an action to be filed within two years after the resulting injury or death. The Georgia statute of repose for medical malpractice is codified at OCGA § 9-3-71 (b); it precludes an action from being brought more than five years from the date of the alleged negligent act or omission.

> [B]y definition, a statute of ultimate repose cannot be "tolled" to permit actions to be brought for injuries which did not occur until after the statutory period had expired. However, the statute of ultimate repose should not be applied to relieve a defendant of liability for injuries which occurred during the period of liability, but which were concealed from the patient by the defendant's own fraud. The statute of ultimate repose should not provide an incentive for a doctor or other medical professional to conceal his or her negligence with the assurance that after five years such fraudulent conduct will insulate him

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[1] *Hill v. Fordham,* 186 Ga. App. 354, 357 (2) (367 SE2d 128) (1988).

> or her from liability. The sun never sets on fraud.[2]

Therefore, if the evidence of defendant's fraud or other conduct on which the plaintiff reasonably relied in forbearing the bringing of a lawsuit is found by the jury to exist, then the defendant is equitably estopped from raising the defense of the statute of repose.[3] But only intentional fraud by the defendant gives rise to the applicability of the doctrine of equitable estoppel.[4]

Osburn brought this suit within two years after her injuries manifested themselves, but more than five years after her last treatment by Goldman. Therefore, this action is barred by the statute of repose absent evidence of intentional fraud by Goldman that deterred Osburn from bringing suit.

In her complaint, Osburn alleged that Goldman had persuaded her to have the silicone injections and had continually represented to her that the injections were safe and would cause her no harm. Osburn further alleged that, when those representations were made, Goldman knew they were false because he knew that silicone injections had been banned by the FDA because of serious problems that do not manifest themselves until years later. For these reasons, Osburn claimed that Goldman had concealed facts showing the existence of her cause of action, so that the doctrine of equitable estoppel thereby barred the defendants from asserting a statute of repose defense.

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[2] *Hill v. Fordham*, supra, at 357-358.

[3] *Esener v. Kinsey*, 240 Ga. App. 21, 23 (522 SE2d 522) (1999).

[4] *Miller v. Vitner*, 249 Ga. App. 17, 18 (546 SE2d 917) (2001).

In his affidavit, Goldman denied Osburn's claim that, at the time he was treating her, the FDA had banned the injection of liquid silicone for cosmetic purposes because of its long-term adverse effects. According to Goldman, although liquid silicone injections had not been approved by the FDA, they were being used "off-label" for cosmetic purposes. Goldman testified that he unequivocally believed the injections were safe and would cause Osburn no harm.

(b) The question presented is whether Goldman's affidavit testimony was contradicted in any material part by affidavits given by Osburn's expert witness, Dr. Alan Boyd, and by Goldman's physician's assistant, Barbara Rosing, so as to create a material issue of fact on the question of fraud. We answer this question in the negative.

"When ruling on a motion for summary judgment, the opposing party should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions therefrom most favorably toward the party opposing the motion. [Cit.]"[5] But should the defendant show an entitlement to summary judgment by demonstrating the absence of evidence as to one essential element of the plaintiff's case, the plaintiff cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.[6] "Summary judgment is appropriate only 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

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[5] *State Farm, Fire &c. Co. v. Goodman*, 259 Ga. App. 62, 63 (1) (576 SE2d 49) (2002) (citations omitted).

[6] *Simmons v. Futral*, 262 Ga. App. 838 (586 SE2d 732) (2003).

any material fact and that the moving party is entitled to a judgment as a matter of law.'"[7]

Boyd's testimony showed that although the FDA had not approved the use of liquid silicone injections, neither had it banned such injections due to their adverse long-term effects. According to Boyd, when Osburn began receiving the silicone injections, their side effects were in the formative stages of being researched and published in the medical literature, although several articles had appeared in the literature prior to that time documenting cases of patients like Osburn who had experienced untoward effects from such injections. Boyd, however, acknowledged that, under the standard of care in 1991 and 1992, the injections given to Osburn were not inappropriate, given that most of the literature to that point had extolled the benefits and relative rarity of complications involving this procedure. But Boyd opined that the injections from late 1992 through 1995 were a deviation from the standard of care, because reports of untoward outcomes, such as that experienced by Osburn, had become better known in the dermatological surgical community by then. In Boyd's opinion, Goldman should have been aware of at least some of these reports and reevaluated whether to continue performing this procedure. Rosing merely testified that Goldman and other physicians in his practice informed their patients that although liquid silicone injections had not been approved by the FDA for cosmetic purposes, they considered the procedure safe.

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[7] *DOT v. Carr*, 254 Ga. App. 781, 782 (564 SE2d 14) (2002), citing OCGA § 9-11-56 (c).

The evidence thus shows without contradiction that, contrary to allegations in Osburn's pleadings, at the time she received the injections the FDA had not banned injections of liquid silicone for cosmetic purposes due to their adverse effects. Construing the evidence and all inferences and conclusions most favorably to Osburn, "[t]here is nothing in the record to reflect that [Goldman] knew at any time that the treatment or opinion given by him was in error, nor is there any evidence that [he] fraudulently withheld such information from the patient."[8] Therefore, the defendants were entitled to summary judgment.

2. For the first time on appeal, Osburn also challenges the constitutionality of the medical malpractice statute of repose under the equal protection clauses of the state and federal constitutions. But the Supreme Court of Georgia has upheld the constitutionality of the statute against such a challenge.[9] Moreover, "[a] constitutional issue cannot be considered when asserted for the first time on appeal but must be clearly raised in the trial court and distinctly ruled upon there."[10] If the constitutional challenge had been raised and ruled on in the trial court, and if it presented an unresolved question, jurisdiction of this case would be in our Supreme Court.

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[8] *Lasoya v. Sunay,* 193 Ga. App. 814, 816 (1) (389 SE2d 339) (1989) (citations and punctuation omitted); see also *Hutcherson v. Obstetric & Gynecologic Assocs. of Columbus,* 247 Ga. App. 685 (543 SE2d 805) (2000); compare *Esener v. Kinsey,* supra.

[9] See *Craven v. Lowndes County Hosp. Auth.,* 263 Ga. 657 (437 SE2d 308) (1993).

[10] *In the Interest of A. A.,* 253 Ga. App. 858, 862 (3) (560 SE2d 763) (2002) (citation and punctuation omitted).

Judgment affirmed. Smith, C. J., and Johnson, P. J., concur.

IN THE STATE COURT OF FULTON
COUNTY STATE OF GEORGIA

BOBBY OSBURN, Plaintiff, v. DR. GILBERT GOLDMAN and ATLANTA CENTER FOR DERMATOLOGIC DISEASES, P.C., Defendants.	)	CIVIL ACTION FILE NO.: 02VS030141B

ORDER

(Filed Sep. 5, 2003)

The above-styled action is before this Court for decision on Defendants' Motion for Summary Judgment. An oral hearing was conducted June 16, 2003.

Having reviewed the record, the Court finds that the instant action was not filed within the five-year statute of ultimate repose for medical malpractice actions. "In no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." *Hill v. Fordham*, 186 Ga. App. 354, 357 (1988). The Court further finds that as a matter of law Plaintiff cannot sustain a fraud claim. Therefore, the Court **GRANTS** Defendants' motion.

IT IS HEREBY ORDERED AND ADJUDGED, that summary judgment be and hereby is awarded in favor of Defendants, Dr. Gilbert Goldman and Atlanta Center for Dermatologic Diseases, P.C., and against Plaintiff, Bobby Osburn.

SO ORDERED, this 5 day of September, 2003.

/s/ Patsy Y. Porter
PATSY Y. PORTER, JUDGE
STATE COURT OF FULTON
COUNTY

Court of Appeals
of the State of Georgia

ATLANTA, AUGUST 27, 2004

The Court of Appeals passed the following order

Case No. A04A1505

BOBBIE OSBURN V. GILBERT GOLDMAN ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta AUG 27, 2004

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William L. Martin III

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: November 22, 2004

Case No. S05C0101

BOBBY OSBURN v. ATLANTA CENTER FOR DERMATOLOGIC DISEASES et al.

COURT OF APPEALS CASE NO. A04A1505

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

SUPREME COURT OF GEORGIA

Case No. S05C0104 Atlanta, December 09, 2004

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

BOBBY OSBURN v. ATLANTA CENTER FOR DERMATOLOGIC DISEASES

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

BOBBIE OSBURN, Plaintiff, vs. DR. GILBERT GOLDMAN, and ATLANTA CENTER FOR DERMATOLOGIC DISEASES, P.C., Defendants	* * * * * * * * * * * *	Civil Action File No. 2002-VS-030141B

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' PARTIAL MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 4, 2003)

COMES NOW, Bobbie Osburn, plaintiff herein and files this her response brief and supporting documents in opposition to defendants' partial motion for partial summary judgment, as the issues of the running of the statute of limitations, the statute of repose, and tolling of the statute of limitations by fraud, and shows this Honorable Court as follows:

I. FACTS

Plaintiff Bobbie Osburn filed suit against these defendants on March 15, 2002, based upon the negligent conduct of these defendants and the injuries sustained by plaintiff as a direct proximate result of that negligent conduct. (See generally plaintiffs' complaint).

As it is pertinent to the issues under consideration in this case, plaintiff was injected with liquid silicone in her face at the persuasion of defendants, with these injections taking place from March 21, 1991 to December 18, 1994 (See deposition of plaintiff pg. 68). Plaintiffs injury occurred in late March, 2000 when plaintiff for the first time had lumps and swelling on her face. Defendants raised the defense of the statute of limitations and the statute of repose in this case, but they are equitably estopped from asserting these defenses due to the fraudulent misrepresentations of Defendant Dr. (and lawyer) Gilbert Goldman, defendants' fraud by misrepresentation and silence, and attempt to buy plaintiff's silence should there be any question that the statute of limitations ran in this case but should be tolled.

For the foregoing reasons the defendants are not entitled to summary judgment, inasmuch as suit was filed with the statute of limitations, and it is unnecessary to show fraud pursuant to O.C.G.A. § 9-3-96 to toll the statute of limitations; moreover defendants' act of fraud by silence (not to mention positive misrepresentations that no allergies nor traveling of the silicone could occur,) and their acts to buy the plaintiff's silence exist in this case.

CONSTITUTIONAL CHALLENGE TO O.C.G.A. § 9-3-71(b)

The statute of repose is set forth in O.C.G.A. § 9-3-71(b). If it is found to be applicable (which plaintiff has shown in Section B does not apply in this case) then plaintiff, pursuant to the constitution of the Untied States, Amendment XIV, Section I, and the Constitution of the State of Georgia, Article I, Section I, ¶II, shows that she is

denied equal protection of the law inasmuch as O.C.G.A. § 9-3-71(b) has unfairly created classes of people who may bring suit from medical malpractice, into (1) those who discover their injuries less than five years after the negligent act of the defendant, who may sue, and (2) those who do not discover their injuries until more than five years after defendants' negligence, who may not.

Furthermore, plaintiff is denied equal protection of the laws inasmuch as an arbitrary time limit has been imposed on medical malpractice victims, which is shorter than the 10 years afforded those whose injuries arise from deficiencies in planning, supervising or construction improvement, as opposed to those injured by medical malpractice, who only have five years (See O.C.G.A. § 9-3-51; 9-3-71(b)).

Plaintiff acknowledges that an equal protection challenge has been made to this statute in *Craven v. Lowndens County*, 264 Ga. App. 657, 658-659 (1) in a 4-3 Supreme Court decision.

Plaintiff submits in a good faith effort to readdress the Supreme Court's position on this issue, that because of the growing complexity of modern medicine, the varying times in which different medical procedures can lead to damage beyond five years after negligence, and because O.C.G.A. § 9-3-71(b) is unequal to the statute of repose set forth in O.C.G.A. § 9-3-51 that this is an appropriate time, 10 years following *Craven*, to reconsider the Supreme Court's divided 4-3 opinion in *Craven*.

CONCLUSION

1.

The Statute of Limitation has not run in this case. Plaintiff has set forth in Section B of this brief that her suit was filed within less than two years of her discovery of symptoms of her injuries caused by defendants' negligence.

2.

The Statute of Repose does not apply in this case inasmuch as defendants are equitably estopped by their fraud asserting it, as fully set forth in Section C of this brief.

3.

While it is unnecessary for plaintiff to present any evidence of fraud pursuant to O.C.G.A. § 9-3-96 to toll the running of the statute of limitations, in this case inasmuch as suit was filed less than two years after the statute began to run, nevertheless to the extent that fraud must be shown to toll the statute of limitations, defendants' fraud by silence and attempts to buy plaintiff's silence, as set forth in Section D of this brief, prevent defendants from summary judgment in their favor in this case.

Plaintiff shows this Honorable Court that defendants are not entitled to partial summary judgment on any basis.

Respectfully submitted this 4th day of April, 2003.

GREER, KLOSIK,
DAUGHERTY & SWANK

/s/ Robert J. McCune
Frank J. Klosik, Jr.
Georgia Bar No. 425300

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Attorneys for Plaintiff

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IN THE COURT OF APPEALS

STATE OF GEORGIA

* *

APPEAL NO. A04A1505

* *

BOBBY OSBURN

Appellant,

v.

DR. GILBERT GOLDMAN and ATLANTA CENTER FOR DERMATOLOGIC DISEASES P.C.

Appellees.

* *

BRIEF OF APPELLANT

* *

FRANK J. KLOSIK
State Bar No. 425300

ROBERT J. McCUNE
State Bar No. 487173

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ATTORNEYS FOR APPELLANT BOBBY OSBURN

* * *

Therefore to the extent that appellees contended below that Appellant Osburn has contradicted herself

about the first appearance of her symptoms in this case, there has been an eminently reasonable explanation provided, not only by direct affidavit testimony of Appellant, but more importantly by Appellant Osburn's immediate correction of the erroneous statement within the confines of her own deposition, and immediately after the erroneous statement. Therefore, it is clearly a question of fact on when Ms. Osburn first experienced her symptoms as a result of the appellees' malpractice, and summary judgment is not authorized as an alternative basis as to the statute of limitation argument, inasmuch as suit was filed within less than two years from the date on which the injury arising from the appellees' malpractice occurred.

4. CONSTITUTIONAL CHALLENGE TO O.C.G.A. § 9-3-71(b)

The statute of repose is set forth in O.C.G.A. § 9-3-71(b). If it is found to be applicable (which appellant has shown in Section III.A.1. does not apply in this case) then Appellant Osburn, pursuant to the Constitution of the United States, Amendment XIV, Section I, and the Constitution of the State of Georgia, Article I, Section I, ¶II, shows that she is denied equal protection of the law inasmuch as O.C.G.A. § 9-3-71(b) has unfairly created classes of people who may bring suit from medical malpractice, into (1) those who discover their injuries less than five years after the negligent act of the appellees, who may sue, and (2) those who do not discover their injuries until more than five years after appellees' negligence, who may not.

Furthermore, Appellant Osburn is denied equal protection of the laws inasmuch as an arbitrary time limit has been imposed on medical malpractice victims, which is

shorter than the 10 years afforded those whose injuries arise from deficiencies in planning, supervising or construction improvement, as opposed to those injured by medical malpractice, who only have five years (See O.C.G.A. § 9-3-51; 9-3-71(b)).

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Appellant Osburn submits, in a good faith effort to readdress the Supreme Court's position on this issue, that because of the growing complexity of modern medicine, the varying times in which different medical procedures can lead to damage beyond five years after negligence, and because O.C.G.A. § 9-3-71(b) is unequal to the statute of repose set forth in O.C.G.A. § 9-3-51 that this is an appropriate time, 11 years following *Craven*, to reconsider the Supreme Court's divided 4-3 opinion in *Craven*. See also this Court's decision in *Beck v. Dennis*, 215 Ga. App. 728 (2) (1994), suggesting that a five-year statute of repose is unrealistically short.

B. <u>The Standard of Review</u>

The standard of review for a trial court's grant of summary judgment is *de novo*. *Durben v. American Materials, Inc.*, 232 Ga. App. 750, (1998)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the trial court's grant of summary judgment in this case.

Respectfully submitted this 12th day of May, 2004.

* * *

IN THE COURT OF APPEALS

STATE OF GEORGIA

* *

APPEAL NO. A04A1505

* *

BOBBY OSBURN

Appellant,

v.

DR. GILBERT GOLDMAN and ATLANTA CENTER FOR DERMATOLOGIC DISEASES P.C.

Appellees.

* *

AMENDED BRIEF OF APPELLANT

* *

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ATTORNEYS FOR APPELLANT BOBBY OSBURN

* * *

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about the first appearance of her symptoms in this case, there has been an eminently reasonable explanation provided, not only by direct affidavit testimony of Appellant, but more importantly by Appellant Osburn's immediate correction of the erroneous statement within the confines of her own deposition, and immediately after the erroneous statement. Therefore, it is clearly a question of fact on when Ms. Osburn first experienced her symptoms as a result of the appellees' malpractice, and summary judgment is not authorized as an alternative basis as to the statute of limitation argument, inasmuch as suit was filed within less than two years from the date on which the injury arising from the appellees' malpractice occurred.

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The statute of repose is set forth in O.C.G.A. § 9-3-71(b). If it is found to be applicable (which appellant has shown in Section III.A.1. does not apply in this case) then Appellant Osburn, pursuant to the Constitution of the United States, Amendment XIV, Section I, and the Constitution of the State of Georgia, Article I, Section I, ¶II, shows that she is denied equal protection of the law inasmuch as O.C.G.A. § 9-3-71(b) has unfairly created classes of people who may bring suit from medical malpractice, into (1) those who discover their injuries less than five years after the negligent act of the appellees, who may sue, and (2) those who do not discover their injuries until more than five years after appellees' negligence, who may not.

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Appellant Osburn submits, in a good faith effort to readdress the Supreme Court's position on this issue, that because of the growing complexity of modern medicine, the varying times in which different medical procedures can lead to damage beyond five years after negligence, and because O.C.G.A. § 9-3-71(b) is unequal to the statute of repose set forth in O.C.G.A. § 9-3-51 that this is an appropriate time, 11 years following *Craven*, to reconsider the Supreme Court's divided 4-3 opinion in *Craven*. See also this Court's decision in *Beck v. Dennis*, 215 Ga. App. 728 (2) (1994), suggesting that a five-year statute of repose is unrealistically short.

B. The Standard of Review

The standard of review for a trial court's grant of summary judgment is *de novo*. *Durben v. American Materials, Inc.*, 232 Ga. App. 750, (1998)

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse the trial court's grant of summary judgment in this case.

Respectfully submitted this 4th day of August, 2004.

* * *